Supreme Court of the United States

October Term, 1976

No. 76-97

MICHAEL PETRYCKI,
Petitioner,

vs.

YOUNGSTOWN & NORTHERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is fully presented in the Brief for the Petitioner, and is reported at 531 F.2d 1363 (6th Cir. 1976).

JURISDICTION

The jurisdictional requisites adequately appear in the Brief for the Petitioner.

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals for the Sixth Circuit correctly held that the District Court erred when he secretly instructed the jurors, in the absence of counsel or court reporter, and after the jury was sequestered, concerning the maximum amount of damages which the jury could award.

COUNTERSTATEMENT OF THE CASE

This is a Federal Employer's Liability Act case under 45 U.S.C.A., Sections 50 through 61, combined with an alleged Federal Safety Appliance Act violation under 45 U.S.C.A., Sections 1 through 32. Plaintiff was a brakeman employed by the Youngstown and Northern Railroad Company, an Ohio common carrier by railroad subject to both acts.

Plaintiff's complaint was filed in January, 1974, almost two and one-half years after his alleged injury. The circumstances surrounding his alleged injury were unusual in that no direct trauma was inflicted on plaintiff at the date of the alleged injury, August 25, 1971. Rather, he claimed to have been agitated on August 25, 1971, into a coronary heart attack five days after August 25, 1971. His agitation came from witnessing an injury to a fellow employee. The case was tried to a jury.

Sharply contradictory expert testimony was offered as to the cause of plaintiff's admitted heart attack. Conflicting factual testimony was offered as to his conduct and extent of movement at the time he witnessed the other employee's admitted injury. The injury to the other em-

ployee occurred when the other employee caught his thumb between two couplers while attempting to adjust one coupler so it could be connected with another.

The trial lasted four days. The case was submitted to the jury by the Court shortly after one o'clock on October 1, 1974. After less than an hour and a half's discussion, the jury submitted a question to the Court in writing. The question was:

> "Are we correct in understanding we may award only up to the amount asked for by the plaintiff [in his closing argument] and, if so, is the figure $205,000 quoted as the maximum?"

Without consulting counsel, or even advising them that the question had been submitted, the Court, in the absence of the court reporter, sent an answer in writing to the jury. The answer to the jury was:

> "The prayer of the complaint sets forth the maximum amount that may be awarded. The prayer is for $250,000."

Earlier, during a discussion on requests to charge, the Court had refused plaintiff's counsel's request that the Court read the ad damnum to the jury.

Thereafter, the jury's question and the Court's answer were dictated by the Court to the court reporter. A few minutes later, after the jury had advised the Court that they had agreed upon a verdict, but before they had announced the verdict, counsel were finally notified of the question and the secret instruction. The jury's verdict was for $247,400.

Motions for judgment notwithstanding the verdict under Rule 50, or, in the alternative, for a new trial under Rule 59, were made and overruled.

On appeal, Respondent presented four issues for review. Stated briefly, they were that the District Court erred when he secretly instructed the jurors in the absence of counsel while they were sequestered during their deliberations; erred in failing to set aside the verdict of the jury on the ground that it was ' ainted by passion and prejudice; erred in the admission of certain hypothetical questions posed by plaintiff's counsel to plaintiff's doctors; and erred in holding that there was sufficient probative evidence of a Safety Appliance Act violation and of a causal connection between such alleged violation and plaintiff's injury to permit the issue to be sent to the jury.

The Court of Appeals decided only the first claim of error. It held that the District Court committed reversible error when he secretly instructed the jurors in the absence of counsel or court reporter and without prior notification to counsel of a question propounded by the jury or of his intended response. In reaching its decision, the Court of Appeals considered and applied the Supreme Court's recent decision in *Rogers v. United States*, 422 U.S. 35 (1975), and an earlier decision of this Court, *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), a civil action.

The Court of Appeals recognized that in giving a secret instruction to the jury the District Court committed error. (Petitioner does not dispute this. Nowhere in his petition is any claim made that the District Court did not commit error.) The Court of Appeals did not stop there, however. Rather, pursuant to this Court's statement in *Rogers*, the statement of Judge Learned Hand in *United States v. Compagna*, 146 F.2d 524, 528 (2nd Cir. 1944), *cert. den'd*, 324 U.S. 867 (1945), and the recent decisions of the Sixth and Seventh Circuits, the Court of Appeals considered whether the error committed was "harmless" error. After carefully reviewing the factual setting in

which the error took place, the time at which the error took place, and the instruction which the court gave in response to the question, the Court of Appeals determined that it could not say that the error was harmless, and consequently reversed and remanded for a new trial.

Petitioner, in total disregard of what the Court of Appeals said, and in total and complete disregard of relevant decisions of this Supreme Court and of various Circuits of the Court of Appeals, makes numerous claims as to why this Superme Court should take this case. Petitioner claims that the decision of the Sixth Circuit is in conflict with *Rogers*, is in conflict with decisions of other Circuits of the Court of Appeals, amounts to the establishment of a new and improper "rule", and, extraordinarily, that the conduct of the Court of Appeals was so egregious that, pursuant to Rule 19, Rules of the United States Supreme Court, this Court should take certiorari because the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Even a cursory review of the decision of the Court of Appeals and of the precedents cited therein reveals that the Court of Appeals applied *Rogers* properly, analyzed this case in terms of the harmless error rule, relied upon and applied *Compagna* and a recent decision of the Seventh Circuit, and, in short, decided the case correctly. Rather than being an extraordinary case which, as Petitioner alleges, constitutes a radical departure from the ordinary course of judicial proceedings, it is respectfully submitted that the decision of the Court of Appeals presents a classic example of the correct application of existing and controlling precedent to a difficult situation. Consequently, it is respectfully submitted that this Supreme Court should deny Petitioner's petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

1. The first reason urged by the Petitioner for granting the writ is that the Court of Appeals ignored *Rogers v. United States, supra*, and particularly ignored the statement in *Rogers* that, in proper circumstances, the "harmless error" rule could apply. The Sixth Circuit did no such thing. At pages A7, A8, and A9 of its decision (page references are to Appendix A to Petitioner's brief), the Sixth Circuit analyzes *Rogers* in detail, and notes that the Sixth Circuit already had applied "the guidance provided by the Supreme Court" in *Rogers* in *United States v. Gay*, 522 F.2d 430 (6th Cir. 1975). The Sixth Circuit specifically notes that, in *Gay*, it recognized that secret communication between the Court and the jury "may amount to harmless error" and "will not require reversal where substantive rights of parties have not been adversely affected." (A8 and A9).

After analyzing these precedents, the Sixth Circuit held:

> "We reach the conclusion that the secret communication herein was error which, absent affirmative evidence to the contrary, cannot be said to have been harmless." (A9-A10).

The next paragraph of the Opinion analyzes in great detail why the Sixth Circuit could not say that the error was harmless. In short, the Sixth Circuit recognized that the inquiry from the jury came at "a crucial period in the trial process." Recommendations each counsel could have made were discussed. Also, the Court of Appeals believed that the jury might well have been influenced by the secret instruction, particularly because the secret instruction was not embellished with a cautionary statement that the prayer for relief did not in any way constitute evidence and that, in fact, the jury should not concern itself with it whatsoever.

In short, if the trial court intends to read the prayer for relief to the jury, it is important that counsel know this will be done and that the jury be properly informed by both court and counsel that the prayer for relief does not constitute evidence, cannot be considered by the jury except as fixing the maximum amount of the verdict, and must not be otherwise considered by the jury. Here the secret instruction does not contain any of these safeguards. Rather, it stated simply that the prayer of the complaint set forth the maximum amount, and that amount was $250,000.00. One can hardly assume that a jury is familiar with the terms "complaint" and "prayer for relief." The trial judge enlightened the jury on none of these matters at the time it gave its secret instruction.

Of course, reference to the prayer for relief was made in the course of the court's regular instructions. It was made more than midway through the instructions, which take up approximately 33 pages in the record, and 21 pages in the Appendix. It is conjectural to believe that the jury would remember the admonitions concerning the prayer for relief inserted in the midst of all of these lengthy instructions. For the trial court properly to have instructed the jury with respect to the prayer for relief in a supplementary instruction, he should have repeated and explained that instruction. This he did not do.

Finally, it is essential to remember that at a critical stage of the trial, after the jury had commenced its deliberations, a dollar amount was given to it, without explanation, by the symbol of authority, neutrality and partiality, the trial judge. It was these facts and considerations which compelled the Court of Appeals to reverse this case.

2. No doubt aware that the "conventional wisdom" is that petitions for certiorari are most often granted when a conflict exists between or among the Circuits of the Court of Appeals, Petitioner strains mightily to create a conflict between the instant case and *Charm Promotions Ltd. v. Travelers Indemnity Co.*, 489 F.2d 1092 (7th Cir. 1973). No matter how hard Petitioner strains, no conflict exists. As in the instant case, the Seventh Circuit in *Charm* applied the harmless error rule (Rule 61, Federal Rules of Civil Procedure). The Sixth Circuit agrees with the application of this rule. Further, *Charm* relied strongly on *United States v. Compagna, supra*, and stated that *Compagna* "represents sound doctrine." Similarly, the Sixth Circuit also relied on *Compagna* (A11). The Seventh Circuit quoted from that portion of *Compagna* where Judge Learned Hand stated that secret communications, while error, would be subject to the harmless error rule and that "while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity."

This is precisely the quotation which the Sixth Circuit used and applied in the instant case. Thus, rather than being in conflict with *Charm*, the instant case closely parallels *Charm*.

It must be mentioned that Petitioner seriously misstates *Charm*. Petitioner claims that *Charm* announced "that a more restrictive rule should prevail in criminal cases where an individual's liberty is at stake and contrariwise, a less rigorous standard is mandated in civil cases." (Petitioner's Brief, p. 15). This is not an accurate *Charm* paraphrase. *Charm* analyzed *Compagna* and *Walker v. United States*, 322 F.2d 424, 435 (D.C. Cir. 1963), *cert. den'd*, 375 U.S. 976 (1954), where the Circuit for the District of Columbia also said: "Such an error does not require reversal, however, when the record shows with reasonable certainty that it did not prejudice a defendant's substantial rights."

After analyzing *Walker* and *Compagna*, the Court in *Charm* stated:

> "*Walker* and *Compagna* were criminal cases but that does not render them inapposite; on the contrary, the refusal to apply a per se rule when an individual's liberty is at stake is persuasive authority that a more rigorous standard is not mandated in civil cases."

Thus, what *Charm* said was that a more restrictive standard was not required in civil cases than in criminal cases. It did not say that a less rigorous standard applied to civil cases.

To a great extent, the heart of Petitioner's claim is that the Sixth Circuit erred in the instant case because it did not apply a less rigorous standard in a civil case than applies in a criminal case. But no authority has taken this position. Petitioner implies that this Supreme Court did so in *Rogers*. However, a review of *Rogers* demonstrates that this Court never implied a dichotomy between civil and criminal cases. In fact, the opposite inference is appropriate because of this Court's lengthy quotation from *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), a civil case. In *Fillippon*, this Supreme Court unanimously condemned the giving of a secret instruction by the trial court. Moreover, with respect to the prejudicial effect of such a secret instruction, this Court stated:

> "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish grounds

for reversal unless it affirmatively appears that they were harmless."

Other decisions of the Court of Appeals apply the same standard in a civil case as in a criminal case. For example, in *Snyder v. Lehigh Valley Railroad Company*, 245 F.2d 112 (3rd Cir. 1957), a civil case, the Third Circuit stated:

> "Whether the sum total of the possibilities stated amounted to a positive affirmative showing of substantial prejudice is unnecessary to a finding that the communication between judge and jury in the absence of counsel here constituted reversible prejudicial error. The strong possibility of substantial prejudice demonstrated here is more than sufficient." p. 116.

Similarly, in *Parfet v. Kansas City Life Ins. Co.*, 128 F.2d 361 (10th Cir.), *cert. den'd*, 317 U.S. 654 (1942), another civil case, the Court held:

> ". . . It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not affirmatively shown."

The Sixth Circuit in the instant case applied the correct standard of law. Its decision was correct. No amount of twisting of *Rogers*, or misstatement of *Charm* and *Compagna*, will alter this conclusion.

CONCLUSION

The decision of the Circuit Court in this case carefully applied *Rogers v. United States, supra,* and is not in conflict with, but is in conformity with, decisions of the various Circuits of the Court of Appeals.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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